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Chap. 10, 75th Congress, 3rd Session 2

In The

Supreme Court of the United States

October Term 1949

No. 293

United States of America,

Petitioner,

v.

Albert J. Rabinowitz,

Respondent.

CROSS PETITION OF ALBERT J. RABINOWITZ FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

The defendant, Albert J. Rabinowitz, prays that, if a writ of certiorari issue herein, this Court review the entire judgment of the United States Court of Appeals, including so much of the judgment as remands the first count.

The Question Presented

Whether a person who knowingly sells altered canceled postage stamps, in order to defraud a philatelist, where no fraud is committed intended or attempted upon the government, is guilty of a crime, under Section 268 of Title 18 U. S. C. A. (Now Sec. 473 of new Title 18).

The defendant was convicted, on two counts, of selling and possessing canceled United States postage stamps,

which had been altered for the purpose of defrauding collectors of postage. The alterations were not made so as to destroy or impair the cancellation marks. There is no factual dispute. The government did not contend that the defendant did or attempted anything which would render the stamps usable as postage. The government's proof is admittedly to the contrary and indeed the price at which the cancelled stamps were sold far exceeds the face of the postage.

The first question arising in this case is whether the acts of the defendant constitute a federal crime. The government relies upon the language of Sec. 261 of Title 18 (now Sec. 8 of new Title 18) defining "Obligation or other security of the United States" to include "canceled United States stamps". These words were not in the statute prior to 1938. They were added as part of the general revision of a number of sections of the law designed to permit the illustration of United States canceled and uncanceled stamps, in catalogues and other publications (Chap. 10, 75th Congress, 3rd Session).

Your petitioner submits that there is a serious question involved as to whether the words "canceled United States stamps" should be read literally, so that an alteration of a canceled stamp, as a canceled stamp, where there is no intent to make it usable or practice a fraud on the government is a crime under Sections 265 or 268 of Title 18 (now Sections 473 and 472 of new Title 18).

The Specifications of Errors to be Urged

The Court of Appeals erred in not dismissing the first count, on the ground that: the sale of altered canceled stamps for the purpose of defrauding a collector of canceled

postage, where no fraud was attempted or practiced on the government and the cancellation marks upon the stamps were not altered or obliterated, is not a violation of Sections 265 or 268 of Title 18 (now Sections 473 and 472 of new Title 18).

Herewith petitioner submits a brief upon the questions raised in the solicitor general's petition and in this petition.

It is respectfully submitted that if the government's petition for certiorari is granted the cross petition should be granted so as to bring up all of the questions of law involved.

September 21, 1949.

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Respondent,

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Brief on Behalf of Respondent

With due deference to the majority opinion of the Court of Appeals, it is submitted that were *Harris* v. *U. S.*, 331 U. S. 145 the last utterance of this Court, the search and seizure involved here would not come within either the decision of that case, or the language of the majority opinion.

Admitted facts surrounding the search and seizure in this case are:

(a) Prior to the arrest the government possessed the dies which had been used in making the overprints on the four stamps purchased;

(b) The government had defendants receipted invoice for the sum of $1.72 paid in cash for the four stamps purchased;

(c) The stamps seized (second count, possession) had no relation to the four stamps sold (first count, selling).

(d) The stamps seized were legitimately issued stamps actually canceled by the Post Office. It is not contended that they were stolen or unlawfully obtained. Nothing had been added to or subtracted from the stamps which would render them useful as postage.

The importance of the *Harris* case lies in the exception which it adds, to make admissible evidence seized in the course of a search without a warrant—evidence obtained in the course of a search started in good faith to find the means or instrumentality by which the crime was committed.

This Court in the *Harris* case did not overrule *United States* v. *Lefkowitz*, 285 U. S. 452; *Go Bart Co.* v. *United States*, 282 U. S. 344, nor did it give sanction to receipt of evidence obtained by a general exploratory search.

It is therefore respectfully urged that even in the absence of *Trupiano* v. *United States,* 334 U. S. 669, the evidence obtained as a result of the search in this case would have been inadmissible.

Should this Court decide to review this case it is urged that the Court bring up the entire record, including the refusal of the Court of Appeals to dismiss the first count.

The defendant contended below that the acts charged against him did not constitute a violation of Sections 265 and 268 of Title 18 (now Sections 473 and 472 of new Title 18). These are two of the counterfeiting sections of the criminal code. They are designed to punish those who engage in counterfeiting or dealing in counterfeit "obligations or other securities of the United States". The Court of Appeals held that the inclusion of the words "canceled United States stamps" in the definition of "obligations or other securities of the United States" renders a person liable, for violating the counterfeiting sections, who makes an alteration in a canceled stamp, as a canceled stamp, with no intention of defrauding the government and under circumstances wherein it would not be possible to cheat the government. As in this case wherein the cancellation marks on the canceled stamps were admittedly not obliterated or altered.

The Court of Appeals reached this result by reading Section 261 of Title 18 (now Sec. 8 of new Title 18) literally to encompass any change in a canceled stamp designed to commit a fraud upon any person.

The words "canceled United States stamps" were added to the section in 1938 as part of a general legislative plan to permit the illustration of canceled and uncanceled stamps in magazines and catalogues. The object sought to be attained by Congress was the protection of the integrity of postage as postage and not the protection of the philatelist. The Treasury Department was fearful

that plates designed to reproduce canceled postage might with slight alteration be used to produce stamps simulating unused postage. Section 261 of Title 18 was therefore amended to include the words "canceled United States stamps" so as to permit the government to seize unlicensed plates from which either canceled or uncanceled stamps were printed. This is clearly shown by the letter from Mr. Wayne C. Taylor, acting secretary of the Treasury Department to Vice President Garner, which is quoted in the case of *United States* v. *Pappas,* 134 F. (2nd) 922 (C. C. A. Second Circuit).

It should be noted that Section 348 of Title 18 (now Sec. 501 of new Title 18) still stands, so that one who "forges or counterfeits any postage stamps * * * shall be fined not more than $500 or imprisoned not more than five years or both". The penalty under Sections 265 and 268, under which the defendant was convicted is far greater (up to $5000 and fifteen years under Sec. 265 and up to $5000 and ten years under Sec. 268). If the government's construction of the words "canceled United States stamps" is correct the penalty for making a change in a canceled stamp as a canceled stamp—to defraud a stamp collector—is far greater than the specific penalty for manufacturing an uncanceled stamp to defraud the government under Section 348 (now 501).

The court below relied upon *Foster* v. *U. S.,* 76 Fed. 183 and *Errington* v. *Hudspeth,* 110 Fed. (2) 384, both decided by the Circuit Court of Appeals of the 10th Circuit. Neither case involved canceled postage. The *Foster* case involved a change made in a genuine U. S. five dollar note, the *Errington* case a change made in an uncanceled stamp. The money and the stamp involved in those cases were both obligations of the United States in the true sense. The government had made a commitment still unfulfilled as to each. In the case of the canceled stamp no government commitment remained. There was no obliga-

tion on the part of the government and none was created or simulated by the acts of the defendant or his confederate, leading to the sale.

The literal application of the statute places one who makes an alteration in a canceled stamp, to cheat a collector of canceled stamps, in the category of the counterfeiter of currency. The counterfeiter of currency is one of the most heinous of criminals. As to him the possible punishment provided in the Criminal Code is most severe. The attempt to apply that severe punishment to one who engages in a petty scheme to defraud, punishable under state law, should not lightly be imputed to Congress even though a literal reading of the statute might lead to that result.

Holy Trinity Church v. *United States*, 143 U. S. 457.

CONCLUSION

Should a writ of certiorari issue upon the government's petition, it is requested that the writ bring up for review the entire judgment of the Court of Appeals.

Respectfully submitted,

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